

ISSUES

The claimant alleged he suffered a series of repetitive injuries through September 22, 2004. As a result of his injuries he had bilateral carpal tunnel surgery, bilateral elbow surgery, shoulder surgery and cervical surgery. Claimant also alleged he suffered injury to his low back. This claim was settled on December 4, 2006, for a negotiated lump sum premised upon permanent total disability considerations. Future medical treatment for the cervical spine, left shoulder and bilateral upper extremities was left open but respondent specifically disputed whether future medical treatment for the lumbar spine was causally related to a series of repetitive use injuries or aggravations. Consequently, it was further noted that future medical treatment for the lumbar spine remained at issue.

On March 6, 2009, claimant filed an application for post-award medical treatment for additional medical treatment for his lumbar spine, specifically surgery recommended by Dr. Steven J. Hess. A post-award hearing was held on August 13, 2009. Respondent disputed whether the claimant suffered a compensable series of injuries to his low back. The Administrative Law Judge (ALJ) determined claimant had met his burden of proof that he suffered a repetitive series of injuries to his low back while working for respondent. Accordingly, the ALJ ordered respondent to provide the medical treatment recommended by Dr. Hess.

Respondent requests review of whether the ALJ erred in finding that claimant sustained injury to his low back from a series of accidents arising out of and in the course of employment and whether the ALJ erred in awarding post-award medical treatment by Dr. Hess for claimant's low back.

Claimant argues the ALJ's decision should be affirmed.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The claimant was employed as a concrete truck pump operator for respondent. Claimant described his work activities as requiring him to put together the pipes that formed the boom through which the concrete was pumped from the truck. Claimant would use his back, shoulders and neck to push on the boom when it became clogged with cement. As he performed his work he noted back pain which would increase through the week until by Friday it was "pretty well hurting". During this same time period the claimant also experienced injuries to his wrists, elbows, shoulder and neck which are not disputed by respondent.

Claimant noted that after the final surgery on his neck he continued to experience stiffness in his low back as well as constant left leg pain and intermittent right leg pain. As a result of his low back complaints, respondent referred claimant to Dr. Steven J. Hess. In a report dated January 17, 2006, Dr. Hess was provided a history that claimant had complained of low back pain which had been intermittent but present for a year and had increased for the last six months.

Dr. Prostic had examined claimant and issued a report dated September 29, 2004, which did not mention claimant's low back but at that time the report focused primarily upon claimant's need for treatment for his cervical spine. In a second report dated June 21, 2006, Dr. Prostic noted claimant's complaints of low back pain radiating down his left leg.

On December 4, 2006, the parties agreed to a compromise settlement of this claim for a lump sum with the right to future medical left open. At the settlement hearing the claimant was asked by the Special Administrative Law Judge (SALJ) what parts of his body were hurt and he responded that he had hurt his hands, elbows, neck, shoulder and back. And claimant further noted he had received treatment for all the injuries except his back. As previously noted respondent disputed that claimant's lumbar spine complaints were causally related to repetitive activities performed at work. The respondent specifically noted at the settlement hearing:

Respondent and Insurance Carrier dispute that any future medical treatment needs for other body parts, including but not limited to the lumbar spine, are causally related to the series of repetitive-use injuries or aggravations that occurred up to September 22, 2004, and future medical treatment for other body parts remain at issue.²

Respondent concluded that claimant's low back complaints were unrelated to his work because of the absence of contemporaneous back complaints during all the treatment he received for his upper extremities and cervical spine. In contrast, claimant testified that he had complained to Drs. Stepp, Prostic and Hess about his back complaints before the claim was settled.

On March 6, 2009, claimant filed an application for post award medical requesting additional medical treatment. A hearing was scheduled for April 20, 2009, and the ALJ issued an Order for Independent Examination on April 20, 2009, authorizing Dr. Vito J. Carabetta to determine causation and need for medical treatment with regard to claimant's low back. Dr. Carabetta performed a physical examination of claimant on June 5, 2009, and diagnosed claimant as having lumbar spinal stenosis. The doctor opined:

The physical examination findings correlate well with the patient's subjective complaints. He has evidence of some degree of myelopathy, and this coincides

² S.H. Trans., Worksheet at 2.

well with the diagnostic workup changes consistent with lumbar spinal stenosis. Operative intervention has been actively considered for this, and appears to be clinically indicated. It appears that the key question that the Court has raised is in terms of relatedness of his lower back complaints from a causal perspective and his work-related injury. He is quite specific about the injury date, and reports that it is indeed not July 1, 2003, but rather an incident that occurred on April 28, 2004 that would have been responsible for this. In the past, I had only seen him for electrodiagnostic studies, with the last of these having been done July 20, 2004. He is quite certain that he reported these complaints to Dr. Stepp. My review of the medical records on his multiple visits with Dr. Stepp was noteworthy only for some limited description in the note of December 13, 2004. In that it was stated that the patient does describe "some occasional low back pain. He has no pain, weakness, or sensory loss involving his lower extremities." On follow-up visits with Dr. Stepp, there was no further notation. This is a far cry from what the patient is describing at this time. In other records, those of Dr. Prostin and Dr. Hess, I did not see any discussion of causation, and indeed Dr. Prostin did not even mention the lower back area. Based on the overall presentation, given that we are dealing with primarily degenerative changes causing stenosis, although there is indeed some local compromise at the L5-S1 level, it is doubtful that the mechanism described by patient as having occurred on April 28, 2004 would have been truly a causative factor in terms of developing his lower back complaints.³

Because Dr. Carabetta focused upon a specific April 28, 2004 discrete trauma when he made his causation determination, the parties requested a supplemental report regarding whether claimant's repetitive work activities could have caused or aggravated his low back condition.

In a letter dated July 30, 2009, Dr. Carabetta provided, in pertinent part, the following supplemental opinion:

The key question at this time is whether the repetitive nature of his job activities following that time through September 22, 2004 would have been contributory. The passage of time results in degenerative disk disease essentially for all individuals, though the amount of time necessary would be variable from person-to-person. Much of this is driven by genetics. Therefore, the passage of an additional 15 months or so following the incident he described would have been contributory, as would have been the last almost five years since that time, and any and all life events prior to July 1, 2003. Therefore, in response to the specific wording of the issue that has been raised, the job activities through September 22, 2004 could have potentially aggravated, accelerated, or intensified an underlying condition.

Workers who are injured in accidents arising out of and in the course of their employment are entitled to receive benefits under the Kansas Workers Compensation Act,

³ Carabetta's IME report dated June 5, 2009.

including such medical treatment that may be reasonably necessary to cure and relieve the workers from the effects of their injuries. K.S.A. 44-510h(a) provides:

It shall be the duty of the employer to provide the services of a health care provider, and such medical, surgical and hospital treatment, including nursing, medicines, medical and surgical supplies, ambulance, crutches, apparatus and transportation . . . as may be reasonably necessary to cure and relieve the employee from the effects of the injury.

And the injured workers' rights to receive medical benefits continue after an award for compensation has been entered. The post-award medical statute, K.S.A. 44-510k(a), provides, in pertinent part:

At any time after the entry of an award for compensation, the employee may make application for a hearing . . . for the furnishing of medical treatment. . . . The administrative law judge can make an award for further medical care if the administrative law judge finds that the care is necessary to cure or relieve the effects of the accidental injury which was the subject of the underlying award.

K.S.A. 44-510k provides that further medical care for a work-related injury can be ordered based upon a finding such care is necessary to cure or relieve the effects of the injury which was the subject of the underlying award. The controlling issue is whether claimant's present need for medical treatment for his low back complaints is directly and naturally related to a series of repetitive injuries suffered at work through September 22, 2004, his last day worked for respondent.

The claimant's primary complaints were to his upper extremities as well as his neck and those injuries resulted in numerous surgeries. He testified that he also complained of low back pain as he underwent treatment and surgeries for his various injuries. In Dr. Carabetta's report he noted that claimant had complained of occasional low back pain to Dr. Stepp in December 2004. This corroborates claimant's testimony that he had occasional low back pain and had complained. But simply stated, the other injuries were the primary focus of his ongoing medical treatment.

Before the case was settled claimant again complained about his back pain and Dr. Hess had diagnostic studies performed which confirmed claimant suffers from a left L5-S1 disk protrusion. And although Dr. Hess' report indicates an onset of back pain one year earlier which would have been a few months after he last worked for respondent, the claimant testified that he had back pain before that date. Again, Dr. Carabetta's report confirmed claimant complained of back pain to Dr. Stepp in 2004. Finally, Dr. Carabetta concluded that claimant's job activities through September 2004 could have potentially aggravated, intensified or accelerated his underlying low back condition.

The ALJ concluded:

The court finds that the duties required of Claimant to perform his work for Respondent did cause injury to his low back during this series of accidents and further finds that Dr. Hess is an appropriate physician to provide medical treatment. Therefore, Respondent is ordered to provide medical treatment as recommended by Dr. Hess for Claimant's low back condition.

Based upon claimant's testimony⁴ and the medical records, the Board finds claimant has met his burden of proof to establish that he suffered work-related repetitive trauma to his low back. The ALJ's Preliminary Decision is affirmed.

AWARD

WHEREFORE, it is the decision of the Board that the Preliminary Decision of Administrative Law Judge Marcia L. Yates Roberts dated August 17, 2009, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of October 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Michael R. Wallace, Attorney for Claimant
William G. Belden, Attorney for Respondent and its Insurance Carrier
Marcia L. Yates Roberts, Administrative Law Judge

⁴ *Hanson v. Logan U.S.D.* 326, 28 Kan. App. 2d 92, 11 P.3d 1184, *rev. denied* 270 Kan. 898 (2001).